12-22-2017

State v. Elwood Respondent's Brief Dckt. 44778

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 44778 & 44779**
Plaintiff-Respondent,	)	
	)	**Canyon County Case Nos.**
v.	)	**CR-2016-5250 & CR-2016-5300**
	)	
KARLY IRENE ELWOOD,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Karly I. Elwood appeals from the judgment of conviction entered upon her conditional guilty pleas to two counts of possession of methamphetamine and one count of misdemeanor possession of drug paraphernalia.

Statement of Facts and Course of Proceedings

In its order denying Elwood's motion to suppress, the district court set forth the following facts, which have not been challenged by Elwood on appeal:

> At approximately 12:40 a.m., March 20, 2016 Nampa Police Officer Chris Orvis, who at that time was a certified K-9 drug dog handler, and Nampa City Police Officer Zodrow responded to a report of a white car parked in the driveway of an abandoned home located at 19 N. Amanda Drive, Nampa. The report was made by neighbors who indicated the car was parked in the driveway of the abandoned residence and the circumstances were suspicious. When the officers arrived at the identified residence, they observed that no car was present, but proceeded to exit their vehicles and check out the residence to see if anyone was inside. The residence appeared to be abandoned and had signs on the front door and window indicating the property was being supervised by Altisource Portfolio Solutions with out of state contact information. The posted material also indicated the property was for sale or lease by "All Safe Home Watch".
>
> The officers looked through the windows and observed some garbage and clothing strewn about the interior, which suggested that someone had recently been inside, but it did not appear that anyone was residing there. Officer Orvis did not observe any furniture of fixtures in the residence that would be [sic] typically be present in an occupied residence. Officer Orvis opined that there had been problems experienced with crimes in vacant houses in the community such as vagrancy, vandalism or use as drug houses. When checking out a vacant residence, officer protocol would be first address officer safety issues, secure the perimeters of the property and then locate contact information to address any possible crime. Officer Orvis felt that it was suspicious that the property appeared abandoned or vacant, but recently occupied because of the drink cups

and food items strewn about in the residence. He checked the doors to the residence and all doors were secure. He did not observe any signs of forced entry to the residence. Following this initial check of the residence, Officer Orvis advised Officer Zodrow that he could declare himself off shift and leave. Officer Orvis then returned to his patrol vehicle to add comments to the report on the call.

Before leaving the scene of this investigation, and while completing his call notes from the incident in his patrol vehicle parked a couple of houses down from the residence in question, Officer Orvis observed a vehicle that he perceived to match the one identified in the suspicious activity report approach the scene by driving across the opposite lane of travel, and park facing the wrong direction (opposite) to the flow of traffic in front of 19 N. Amanda Drive. At this time, Officer Orvis was sitting stationary in his patrol vehicle with no emergency lights or siren on. He may have had parking lights on. The vehicle that he observed pull up in front of the residence was a light silver four door Toyota passenger vehicle. Officer Orvis observed that there were four occupants in the vehicle. He also observed the male driver exit the vehicle and immediately walk towards the residence in question.

Officer Orvis exited his patrol vehicle, approached and made contact with the driver at a point where the driver was almost to the front door of the house in question. At this time, Officer Orvis was dressed in his regular duty uniform with badge and patches. Officer Orvis questioned the driver for about a minute about what he was doing at the house indicating his vehicle matched the description of [the] suspicious vehicle from the earlier report. Officer Orvis also questioned the driver about the traffic infraction that Officer Orvis had observed the driver commit. The driver identified himself as Daniel Matthews, and confirmed he had been at the house earlier, but stated that he was simply there to help a friend move. The driver of the vehicle said he would attempt to contact a person named "Chanelle" to provide validation for his reason for being at the residence. Officer Orvis did not recall that the driver ever reached "Chanelle". He asked the driver to return to his vehicle. The driver was still on the phone while Officer Orvis proceeded to engage in contact with the passengers in the vehicle.

Officer Orvis then proceeded to make contact with and spoke with the other three passengers in the vehicle including the Defendant, who was seated in the rear seat on the passenger side. Officer Orvis testified that when he approached the vehicle and made contact with the passengers, the Defendant had difficulty answering simple questions and exhibited some jerky movements, which Officer Orvis understood from this training and experience to be signs that she might be under the influence of narcotics. Officer Orvis also recognized the

front seat passenger, who had identified himself as Tyler Schlapia, as being a known subject of prior narcotics investigations.

After gathering identification information for the driver and the three passengers, Officer Orvis returned to his patrol vehicle to run that information through dispatch. He had collected whatever driver's licenses or identification information the passengers could provide at that point. While Officer Orvis was running the information through dispatch, he moved his patrol vehicle to a location behind the suspect vehicle and turned on his overhead emergency lights. The passengers of the Toyota remained in the vehicle while Officer Orvis forwarded their identification information to dispatch so that a wants/warrant check could be run. While Officer Orvis was still in his vehicle in the process of conversing with dispatch he observed what he characterized as furtive movement by the occupants of the vehicle. Officer Orvis noted from his fifteen years of narcotics investigations that the furtive moments by passengers in a vehicle being investigated were typical of persons trying to hide contraband including drugs and paraphernalia. During his initial contact with the Defendant, Officer Orvis observed that the Defendant exhibited quick, jerky movements, had difficulty staying on task or following direction. She appeared to him to be under the influence of narcotics based on his experience and training as a police officer.

After Officer Orvis had provided the information to dispatch, and before dispatch responded to the check, Officer Orvis proceeded to run his K-9, Faro, around the suspect vehicle. Officer Orvis ran his drug canine around the suspect vehicle based on circumstances of this contact, including the late night suspicious activity call, his personal familiarity with Mr. Schlapia's prior history of involvement with illegal narcotics transactions in Nampa, the furtive movements of the vehicle's occupants, the reluctance or difficulty the vehicle occupants demonstrated in providing identifying information and eye avoidance. The K-9 alerted at an external location between the front and rear passenger doors of the Toyota. Officer Orvis had previously updated Officer Zodrow who was on his way back to the scene at this point. Once Officer Zodrow arrived, Officer Orvis advised him of the drug dog's positive alert on the vehicle and the officers began to further interview the vehicle's occupants.

After Officer Zodrow had arrived, Officer Orvis also received a response to his inquiry from dispatch on three of the persons. Dispatch could not identify the fourth individual. It eventually turned out that the fourth individual had provided Officer Orvis with a false name, because the individual had an outstanding warrant for his arrest. This individual's true identity was discovered when his identification was located in Defendant's purse. Officer Orvis

> interviewed Mr. Mathew [sic], the Defendant, and Mr. Schlapia. During his interview of the Defendant, she admitted that she had [a] metal aluminum container in her bra that contained two blue pills. The Defendant handed over the container, and Officer Orvis identified the pills to be oxycodone. From the time Officer Orvis initially collected the vehicle occupant's identification information and inquired of dispatch, he opined that it took less than two minutes for him to move his car, activate his overhead lights and remove the drug dog from his vehicle so he could conduct an external sniff search of the suspect vehicle. He proceeded immediately to run the drug dog around the vehicle which he testified took approximately thirty (30) seconds.
>
> Following the Defendant's admission [that she] had a box with pills hidden in her bra, the vehicle was searched and during the search Officer Orvis located a purse in the trunk of the vehicle. Officer Orvis also observed that the rear seats of the vehicle could be folded down, and could allow access to the trunk from inside the passenger compartment of the vehicle. Officer Orvis testified that the purse was located directly behind where the Defendant had been seated. The Defendant admitted that the purse belonged to her when questioned. A search of the purse revealed baggies, a syringe with a brown liquid in it, foil with residue, a scraper tool, tooter, a digital scale with a crystal white substance on it, along with several other items.

(R., pp.110-114 (footnote omitted).)

The state charged Elwood with two counts of felony possession of a controlled substance (methamphetamine and oxycodone), and one misdemeanor count of possession of drug paraphernalia. (R., pp.7-8, 30-32.)

On June 23, 2016, 55 days after Elwood entered a not guilty plea on April 29, 2016 (R., p.14), she filed a motion to suppress her admissions to police and physical evidence seized from the car (R., pp.40-49). Specifically, Elwood argued that the officers lacked reasonable suspicion to seize her and/or unlawfully extended the seizure to run the drug dog around the vehicle. (Id.) Because I.C.R. 12(d) requires motions to suppress to be filed within 28 days of a defendant's not guilty plea, Elwood contemporaneously filed a motion to enlarge time and an affidavit in

support. (R., pp.38-39; Augmentation.[1]) The state objected to the motion to enlarge time. (R., p.50.)

At a subsequent hearing, the district court first entertained argument from the parties on Elwood's motion to enlarge time. (Tr., p.6, L.24 – p.11, L.16.) Elwood provided three justifications for the late filings: (1) the heavy workload of the Canyon County Public Defender's Office and of Elwood's appointed counsel in particular; (2) appointed counsel was not able to contact Elwood for a period of time after the not guilty plea was entered; and (3) appointed counsel inadvertently failed to calendar the case. (Tr., p.7, L.12 – p.11, L.11.) The court took the matter under advisement and immediately proceeded to a hearing on Elwood's motion to suppress. (Tr., p.11, Ls.12-17.)

After the hearing, and after entertaining post-hearing briefing from the parties (R., pp.62-66, 68-75), the district court entered an order denying Elwood's motion to enlarge time (R., pp.114-117). The court concluded that Elwood failed to demonstrate good cause or excusable neglect to justify the late filings. (R., pp.114-117.) Recognizing that its denial order could ultimately be reversed on appeal, the district court also, in the alternative, denied Elwood's motion to suppress. (R., pp.117-127.) The court concluded that the officers had reasonable suspicion to briefly detain Elwood, and that the drug dog alert which established probable cause to search the car occurred during this lawful seizure. (Id.)

[1] The Idaho Supreme Court granted Elwood's motion to augment the appellate record with her affidavit submitted in support of her motion to enlarge time to file the motion to suppress. (9/5/17 Order.)

Elwood entered a conditional guilty plea to all three charges, preserving her right to appeal the district court's denials of her motion to enlarge time and her motion to suppress. (R., pp.79-103; Tr., p.103, L.19 – p.125, L.13.) The court entered a withheld judgment and placed Elwood on probation for four years. (R., pp.153-155; Tr., p.167, L.2 – p.175, L.23.) Elwood timely appealed. (R., pp.156-159.) Elwood appeals from both the felony and misdemeanor cases were consolidated. (R., p.165.)

ISSUES

Elwood states the issues on appeal as:

I. Did the district court err when it denied Ms. Elwood's motion to enlarge time to file a motion to suppress?

II. Did the district court err when it denied Ms. Elwood's motion to suppress?

(Appellant's brief, p.6)

The state rephrases the issues on appeal as:

1. Has Elwood failed to demonstrate that the district court abused its discretion by denying Elwood's motion to enlarge time to file the motion to suppress?

2. In the alternative, has Elwood failed to demonstrate that the district court erred by denying her motion to suppress?

ARGUMENT

I.
Elwood Has Failed To Demonstrate That The District Court Abused Its Discretion By Denying Elwood's Motion To Enlarge Time To File The Motion To Suppress

A. Introduction

Elwood contends that the district court abused its discretion by denying her motion to enlarge the time to file her motion to suppress. (Appellant's brief, pp.7-14.) However, a review of the record reveals that the district court acted well within its discretion to deny the motion because Elwood failed to demonstrate good cause or excusable neglect to justify the late filings.

B. Standard Of Review

A district court's decision whether to grant a defendant's motion to enlarge time to file a motion to suppress pursuant to I.C.R. 12(d) is reviewed for abuse of discretion. State v. Alanis, 109 Idaho 884, 887-888, 712 P.2d 585, 588-589 (1985).

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the bounds of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower reached its decision by an exercise of reason. State v. Ruperd, 146 Idaho 742, 743, 202 P.3d 1288, 1289 (Ct. App. 2009) (citing State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)).

C. The District Court Acted Well Within Its Discretion To Deny Elwood's Motion To Enlarge Time

Motions to suppress evidence must be filed within 28 days after the entry of a plea of not guilty unless the court, in its discretion, shortens or enlarges the time. Idaho Criminal Rule 12(b), (d). The trial court may relieve a party of failure to comply with this deadline "for good cause shown, or for excusable neglect." I.C.R. 12(d).[2] In the context of analyzing whether "excusable neglect" justified the setting aside of a default judgment pursuant to I.R.C.P. 60(b)(1), the Idaho Court of Appeals recognized that "[n]eglect must be excusable and, to be of that calibre, must be conduct that might be expected of a reasonably prudent person under the same circumstances." Cuevas v. Barraza, 146 Idaho 511, 515, 198 P.3d 740, 744 (Ct. App. 2008) (citing Idaho State Police, ex. rel. Russell v. Real Property Situated in County of Cassia, 144 Idaho 60, 62, 156 P.3d 561, 563 (2007)); see also Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956) (holding mere indifference or inattention will not constitute "excusable neglect" sufficient to set aside a default judgment).

In this case, Elwood did not file either her motion to suppress, or her motion to enlarge time, until June 23, 2016, 55 days after Elwood entered a not guilty plea to the charges, and 27 days after the date the motion to suppress was required to be filed pursuant to I.C.R. 12(b). (R., pp.38-49.) The state objected to the motion to enlarge time. (R., p.50.) At the hearing on the motion to enlarge time, and in her supporting affidavit, Elwood set forth the following

[2] Idaho Criminal Rule 12 was amended in 2017. Pursuant to this amendment, the prior I.C.R. 12(e) was re-numbered as I.C.R. 12(d). Because the subsection did not otherwise change in any material respect, the state refers to the relevant subsection in this brief as the current I.C.R. 12(d).

justifications for the untimely filings: (1) appointed counsel was handling a high case load of approximately 140 cases at the time she filed the motion to suppress and motion for enlargement of time; (2) appointed counsel inadvertently failed to properly calendar the deadline for the motion to suppress; and (3) Elwood failed to contact appointed counsel between the April 29th arraignment and the June 23rd date upon which appointed counsel filed the motion to suppress and motion to enlarge time. (Tr., p.7, L.12 – p.11, L.11; Augmentation.)

In its order denying the motion, the district court cited I.C.R. 12 and applicable case law. (R., pp.114-117.) The court also acknowledged the heavy caseload of the Canyon County Public Defender's Office and noted that it was "sympathetic with this plight." (R., pp.115-116.) However, the court concluded that in the circumstances of this case, which included the motion to enlarge time not being filed until nearly four weeks after the motion to suppress was due, the court did not "feel it [could] simply disregard the specific provisions and purpose of I.C.R. 12[(d)]...in light of the State's objection." (R., p.117.)

On appeal, Elwood appears to focus primarily on the proposed justification of appointed counsel's heavy workload. (Appellant's brief, pp.8-10.) However, Elwood failed to present to the district court any specific nexus between this proposed justification and her actual failure to file either the motion to suppress or the motion to enlarge time within 28 days of the not guilty plea. In fact, appointed counsel acknowledged that as soon as she realized that she missed the deadline, she filed the motion to suppress and motion to enlarge time. (Tr., p.7, L.23 – p.8, L.8.) It stands to reason that if counsel had become aware of the calendaring issue earlier, she would have been able to file the motions earlier – including, if needed, a timely motion to enlarge time

on the ground that counsel needed more time to prepare a motion to suppress due to her heavy workload. In such a motion, Elwood's counsel could have set forth specifics of her workload, estimated the amount of additional time she would need to prepare a motion to suppress, and provided the court an opportunity to weigh the issues related to the heavy caseload against the time limit established by I.C.R. 12(d). Because Elwood provided the district court with no basis from which it could conclude that the late filings were specifically due to the heavy caseload, this Court should not find that the district court erred in declining to find good cause to enlarge the time on such a basis.

Likewise, the proposed justification that Elwood failed to communicate with appointed counsel has no apparent nexus to the late filings. Appointed counsel informed the court that she did not have contact with Elwood between the date of the arraignment and July 7th – which was several weeks after appointed counsel filed her motions to suppress and enlarge time on June 23rd. (Tr., p.8, L.18 – p.9, L.1.) Therefore, despite this lack of contact, appointed counsel was still able to file the motion to suppress and the motion to enlarge time on June 23rd, after the calendaring error was discovered. As the district court noted (R., p.116), appointed counsel had sufficient discovery from which to at least initiate the motion to suppress. If not for the calendaring error, Elwood's counsel could also have filed a motion to enlarge time within 28 days of the entry of the not guilty plea, and, if needed, could have requested more time to file the motion to suppress on the specific ground that she needed to contact Elwood in order to prepare the motion. Further, even if Elwood's unavailability and failure to communicate with her

appointed counsel had some causal nexus with the late filings, the state asserts that this should weigh *against* a finding of good cause, not for it.

Therefore, the state submits that the only proposed justification for the motion to enlarge time which actually related directly to the reason for the untimely filings was appointed counsel's calendaring error. The district court did not abuse its discretion in concluding that this error did not constitute "excusable neglect." As the district court noted, to grant Elwood's motion in the circumstances of this case "would essentially vitiate the applicability of the rule in most of the court's criminal cases." (R., p.117.) Indeed, if a district court lacks authority to deny an I.C.R. 12(d) motion for enlargement of time filed nearly four weeks after the time to file a motion to suppress had expired, where the motion was based only upon a party's inadvertent failure to calendar the matter, it is difficult to imagine a scenario in which a district court could ever deny such a motion – absent a showing, perhaps, of a willful disregard of the deadline or a failure to provide any justification at all. Idaho Criminal Rule 12(d) does not limit a court's discretion in this way. Therefore, this Court should conclude that the district court did not abuse its discretion in concluding that Elwood failed to demonstrate good cause or excusable neglect to enlarge the time to file the motion to suppress.

Elwood also contends that because the district court conducted a hearing on the motion to suppress, and then ruled on that motion, the court's denial of the motion to enlarge time is moot. (Appellant's brief, pp.12-14.) An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." Smith v. Smith, 160 Idaho 778, 784, 379 P.3d 1048, 1054 (2016) (internal quotes and citation omitted). "[T]his Court

will not hear and resolve an issue that presents no justiciable controversy and a judicial determination will have no practical effect on the outcome." Mitchell v. State, 160 Idaho 81, 89, 369 P.3d 299, 307 (2016). Elwood's challenge to the district court's order denying her motion to enlarge time is not moot because this Court's determination on the issue has a practical effect upon the outcome of this case. If this Court concludes that the district court acted within its discretion to deny the motion to enlarge time, then there is no need for this Court to consider her challenge to the district court's denial of her motion to suppress. Because Elwood needs to prevail on *both* issues on this appeal in order obtain the relief of a vacated conviction, neither is moot.[3] Therefore, this Court should decline Elwood's invitation to deem this issue moot and to consider only her challenge to the district court's denial of her motion to suppress.

The district court acted well within its discretion to deny Elwood's motion for enlargement of time to file a motion to suppress. This Court should therefore affirm the district court's denial of this motion, and Elwood's judgment of conviction.

II.
In The Alternative, Elwood Has Failed To Demonstrate That The District Court Erred By Denying Her Motion To Suppress

A. Introduction

Elwood contends that the district court erred by denying her motion to suppress. (Appellant's brief, pp.14-25.) Specifically, Elwood contends that officers lacked reasonable suspicion to detain Elwood at the time they took her driver's license, and that this seizure was

[3] To the contrary, since a holding in favor of the state on either issue would result in the judgment of conviction being affirmed, such a holding on one issue would render the other issue moot.

therefore unlawful. (Id.) A review of the record reveals that the district court properly denied the motion. Therefore, even if this court concludes that the district court abused its discretion by denying the motion to enlarge time, it should still affirm the court's denial of the motion to suppress, and the judgment of conviction.

B. Standard Of Review

In reviewing an order granting or denying a motion to suppress evidence, the appellate court applies a bifurcated standard of review. State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009) (citing State v. Watts, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005)). The appellate court will accept the trial court's findings of fact unless they are clearly erroneous, but will freely review the trial court's application of constitutional principles and determinations of reasonable suspicion, in light of the facts found. Purdum, 147 Idaho at 207, 207 P.3d at 183 (citing State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007)), State v. Munoz, 149 Idaho 121, 127, 233 P.3d 52, 58 (2010).

C. The District Court Properly Denied Elwood's Motion To Suppress

An investigative detention is a seizure of limited duration to investigate suspected criminal activity and does not offend the Fourth Amendment if the facts available to the officer at the time gave rise to reasonable suspicion to believe that criminal activity was afoot. State v. Stewart, 145 Idaho 641, 644, 181 P.3d 1249, 1252 (Ct. App. 2008) (citing Terry v. Ohio, 392 U.S. 1 (1968)). "The justification for an investigative detention is evaluated upon the totality of the circumstances then known to the officer." State v. Sheldon, 139 Idaho 980, 983, 88 P.3d

1220, 1223 (Ct. App. 2003) (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). Evidence sufficient to establish reasonable suspicion is "less than that necessary to establish probable cause" but requires "more than a mere hunch." State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). Reasonable suspicion "does not require a belief that any *specific* criminal activity is afoot to justify an investigative detention; instead, all that is required is a showing of objective and specific articulable facts giving reason to believe that the individual has been or is about to be involved in *some* criminal activity." State v. Perez-Jungo, 156 Idaho 609, 615, 329 P.3d 391, 397 (Ct. App. 2014) (emphasis original). In addition, "innocent acts, when considered together, can be sufficiently suspicious so as to justify an investigative detention." State v. Neal, 159 Idaho 919, ___, 367 P.3d 1231, 1237 (Ct. App. 2016) (citing United States v. Sokolow, 490 U.S. 1, 9-10 (1989)). Further, the purpose of an investigative stop is not permanently fixed at the moment the stop is initiated because suspicion of criminality different from that which initially prompted the stop may evolve. Neal, 159 Idaho at ___, 367 P.3d at 1235 (citation omitted).

On appeal, Elwood does not contend that Officer Orvis unlawfully extended any initially-lawful investigatory detention. (See Appellant's brief.) Instead, Elwood contends that Officer Orvis unlawfully seized Elwood, in the first place, when he took her driver's license to run a warrants check. (Id.)

The state agrees that Elwood was seized by the time the officer took the driver's licenses of the occupants of the vehicle. See State v. Zapata-Reyes, 144 Idaho 703, 707, 169 P.3d 291, 295 (Ct. App. 2007); Brendlin v. California, 551 U.S. 249, 257-259 (2007). However, at this point, Officer Orvis possessed reasonable articulable suspicion to detain Elwood. By the time of

the license seizure, Officer Orvis possessed the following indications that criminal activity may have been afoot and that Elwood may be a perpetrator:

- Officers responded to a report of a suspicious white car parked in the driveway at a vacant residence at 19 N. Amanda Drive in Nampa shortly after midnight. (R., p.110.)

- One of the responding officers, Officer Orvis, was aware that there had been issues in the community regarding vagrancy, vandalism, and drug use occurring in vacant homes. (Id.)

- While Officer Orvis was still at the vacant house, a vehicle similar to the one that was the subject of the initial report drove across the opposite lane of travel and parked illegally a few houses down from 19 N. Amanda Dr. (R., p.111.) While the color of the car reported to be parked in the driveway (white) was different than the car that officers observed drive up to the residence (light silver), an admitted photo of the car in which Elwood was a passenger demonstrates how these two colors could easily be confused late at night. (State's Exhibit 4.)

- The driver left the vehicle and approached the front door of the residence at 19 N. Amanda Drive. (R., p.111.)

- The driver of the vehicle informed Officer Orvis that he was at the residence to help a friend move, and admitted that he had been at the residence earlier. (Id.) However, the residence had signs on the front door and window clearly indicating that it was owned by a financial company and was for sale or lease. (R., p.110; State's Exhibits 1-3.) Further, the officers observed through the windows that the home appeared to be vacant and empty, other than garbage and clothing strewn around. (R., p.110.) Officer Orvis was aware that vacant houses in the community had been vandalized and used as drug houses. (Id.) The driver of the vehicle informed Officer Orvis that he would attempt to contact the person whom he was allegedly helping to move, but he apparently was never able to do so. (R., pp.111-112.)

In addition, after Officer Orvis approached the car, he made additional observations about the passengers, including Elwood, that supported the district court's reasonable suspicion determination and the legality of the ongoing detention:

- Elwood had difficulty answering simple questions and exhibited quick jerky movements, which Officer Orvis understood from his training and experience to be signs that she might be under the influence of narcotics. (R., p.112.)

- Officer Orvis recognized the front seat passenger as being a known subject of prior narcotics investigations. (Id.)

- After Officer Orvis returned to his patrol vehicle to run warrant checks on the occupants of the vehicle, he observed the occupants making furtive movements, which Officer Orvis characterized as being consistent with individuals trying to hide contraband. (Id.)

These observed elements collectively constituted far more than a mere hunch. While Officer Orvis immediately had reasonable articulable suspicion to investigate the driver of the vehicle for committing two driving infractions,[4] he had further reasonable articulable suspicion, by the time he seized Elwood, that the occupants of the vehicle might trespass into the vacant financial company-owned house, and/or that the occupants of the vehicle were engaged in drug activity. While the dispatch warrant check was still pending, Officer Orvis ran his drug dog around the vehicle. (R., p.113.) When the dog alerted on the exterior of the vehicle (id.), the

[4] The district court concluded that the driving observed by Officer Orvis appeared to violate I.C. § 49-630 (requiring vehicles to drive on the right half of the roadway), and I.C. § 49-661(2) (requiring vehicles stopped or parked upon one-way highways to face the direction of authorized traffic movement). (R., p.120.)

officers had probable cause to search the vehicle's interior. State v. Anderson, 154 Idaho 703, 706, 302 P.2d 328, 331 (2012).

On appeal, Elwood contends that the facts of the present case are similar to those in Zapata-Reyes, 144 Idaho 703, 169 P.3d 291, and State v. Morgan, 154 Idaho 109, 294 P.3d 1121 (2013). (Appellant's brief, pp.18-20.) However, these cases are distinguishable. Importantly, while the seizures in both Zapata-Reyes and Morgan consisted of traffic stops, Officer Orvis had the opportunity to observe and make contact with the driver and the occupants *before* seizing them, allowing for additional evidence to be developed.

In Zapata-Reyes, in which the Idaho Court of Appeals held that officers failed to possess reasonable suspicion to support an investigatory detention, the officers stopped a vehicle based solely on the information received by police dispatch. Zapata-Reyes, 144 Idaho at 708, 169 P.3d at 296. The reporting party informed dispatch that his house had been shot at two weeks previously, and that he was now concerned because a white vehicle drove by his house twice. The Court of Appeals held that officers lacked reasonable suspicion to stop a white vehicle that was seen by police approximately one block from the residence of the reporting party. Id. at 708-709, 159 P.3d at 296-297.

While the present case, like Zapata-Reyes, started with a reporting party's vague suspicion of a car identified only by common characteristics (white vehicle), the officer in the present case had more specific evidence to support a reasonable suspicion determination. In Zapata-Reyes, the reporting party observed the vehicle driving by his house twice, and then a similar vehicle was observed by officers driving a short distance away. In the present case, a car

was observed in the *driveway* of a vacant house where it had no apparent reason to be, and then the driver of a similar vehicle was observed approaching the front door of that *same house*, where the driver admitted to Officer Orvis that he had been to the same house previously. Officer Orvis was then able to obtain additional evidence, before seizing Elwood, of a type that the officers in Zapata-Reyes could not – including the driver of the vehicle's implausible and unsupported story about helping a friend move, and then Officer's Orvis' own observations about the occupants of the vehicle.

In Morgan, an officer's suspicion of a driver was "based primarily on a series of four left-hand turns that Morgan made." Morgan, 154 Idaho at 112, 294 P.3d at 1124. The Idaho Supreme Court held that "[a]lthough the officer stated that he believed Morgan may have been trying to avoid him, the officer provided no factual justification for that belief," and that "[a]bsent other circumstances, driving around the block on a Friday night does not rise to the level of specific, articulable facts that justify an investigatory stop."[5] Id. As discussed above, because Officer Orvis had the opportunity to make observations regarding the vehicle and its occupants before seizing the vehicle, Officer Orvis obtained far more evidence to support a finding of reasonable suspicion than the officer did in Morgan.

Elwood has failed to show that the district court erred in concluding that the officer had reasonable suspicion to detain Elwood, or that the court erred in denying Elwood's motion to

[5] In Morgan, the Idaho Supreme Court reversed the district court after rejecting the court's conclusion that the officer's stop was justified based upon a reasonable suspicion that the driver violated two statutes. Morgan, 154 Idaho at 112-113, 294 P.3d at 1124-1125. However, in her Appellant's brief, Elwood specifically compares the present case to Morgan only on the basis of the officer's observations of Morgan's driving patterns. (Appellant's brief, pp.18-20.)

suppress. Therefore, even if this Court concludes that the district court abused its discretion by denying Elwood's motion to enlarge time, it should still affirm the judgment of conviction.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction entered upon Elwood's conditional guilty pleas to two counts of possession of a controlled substance (methamphetamine and oxycodone), and one count of misdemeanor possession of drug paraphernalia.

DATED this 22nd day of December, 2017.

/s/ Mark W. Olson_____
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of December, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Mark W. Olson_____
MARK W. OLSON
Deputy Attorney General

MWO/vr